



Freezing and Confiscation of Assets

TRAINING FOR DEFENCE LAWYERS
Online, 23 April 2025



EXCELLENCE IN
EUROPEAN LAW

Speakers

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Key topics

- The EU's legal and regulatory framework to freeze and confiscate assets
- How asset recovery and confiscation work in practice
- Aspects of relevance to the work of criminal defence lawyers

Language
English

Event number
325DT70

Organiser
Ramin Farinpour (ERA)

Freezing and Confiscation of Assets

Wednesday, 23 April 2025

14:40 Connecting to the videoconference platform

15:00 **Opening of the webinar**
Ramin Farinpour

I. EU ASSET RECOVERY AND CONFISCATION LEGISLATION OF RELEVANCE TO LAWYERS

Chair: Ramin Farinpour

15:05 **Current and future applicable legislative framework**

- Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property
- Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union
- Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders
- Directive (EU) 2024/1260 on asset recovery and confiscation

Michaël Fernandez-Bertier

15:45 Discussion

II. HOW ASSET RECOVERY AND CONFISCATION WORK IN PRACTICE

16:00 **Means and methods to recover and confiscate assets**

- Latest trends and actions on tracing, clamping down on and recovering criminal funds and assets
- Targeting unexplained wealth, management and disposal of frozen and confiscated assets
- Cross-border cooperation

Rita Simões

16:45 Discussion

III. ASSET RECOVERY, CONFISCATION AND CRIMINAL DEFENCE

17:00 **Challenges in an evolving regulatory framework**

- Customer due diligence, beneficial ownership, obliged entities
- Circumstantial evidence, fundamental rights aspects

Michaël Fernandez-Bertier

17:45 Discussion

18:00 End of the webinar

For programme updates: www.era.int
Programme may be subject to amendment.



Times indicated are CEST
(Central European Summer Time)

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Objective

This three-hour long webinar, which forms a part of a larger project on European Criminal Law for Defence Lawyers, focuses on EU asset recovery and confiscation measures and practical matters in its application. It will explain and take a closer look at the current EU legislative and regulatory framework and its effect on lawyers, as well as how asset recovery and confiscation work in practice. Challenges regarding asset recovery, confiscation and criminal defence in the evolving EU regulatory framework will also be examined. Insights from practitioners familiar with these instruments who have worked with them in practice will be shared.

Who should attend?

Criminal defence lawyers

Interactive online seminar

The online seminar will be hosted on the Zoom videoconference platform. You will be able to interact immediately and directly with our top-level speakers and other participants. We will make the most of the technical tools available to deliver an intensive, interactive experience. The highest security settings will be applied to ensure that you can participate safely in this high-quality online conference.

Your contacts



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Freezing and Confiscation of Assets

Online, 23 April 2025



Terms and conditions of participation

- No registration fee.
- Participation is only open to lawyers in private practice from eligible EU Member States (Denmark does not participate in the EU Justice Programme) Albania, Bosnia and Herzegovina, Kosovo* and Ukraine.
- A list of participants including each participant's address will be made available to all participants unless ERA receives written objection from the participant no later than one week prior to the beginning of the event.
- The participant will be asked to give permission for their address and other relevant information to be stored in ERA's database in order to provide information about future ERA events, publications and/or other developments in the participant's area of interest.
- A certificate of attendance will be issued after the webinar to all those that participated for the entire event.

* This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ opinion on the Kosovo declaration of independence.

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Save the date

The role of lawyers in protecting and promoting the rule of law and mutual trust

Zagreb, 1-2 April 2025

The scope and application of the EU Charter of Fundamental Rights

Riga, June 2025

Instruments of mutual recognition: EAW, EIO

Budapest, 25-26 September 2025

The role of the CJEU for defence lawyers

Trier, 8-10 October 2025

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ETHICS & COMPLIANCE

FREEZING AND CONFISCATION OF ASSETS CURRENT AND FUTURE APPLICABLE EU LEGISLATIVE FRAMEWORK

ERA
23 April 2025



Co-funded by
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Introduction

Key figures of the underground economy



- **IMF** (1998): **2-5%** of world gross domestic product (GDP)
- **UNODC** (2009): **3.6%** of world GDP (USD **2.1** trillion for 2009)
- **UN** (SG) (2018): **5%** of global GDP = cost of corruption (USD **3.6** trillion)
 - 1** trillion: bribes paid
 - 2.6** trillion : amounts "stolen" by corruption
- **UNODC** (2011): proportion of laundered proceeds seized: **0.2%**

Key figures of the underground economy



- **EU** (2013): EUR **330** billion laundered every year in the EU
- **EU** (2015): main illicit markets in the EU generate EUR **110** billion in revenue per year (**1%** of GDP)
- **EU** (2022): cost of corruption up to EUR **990** billion per year (**6%** of GDP)
- **EUROPOL** (2016): **2.2%** of proceeds of crime (EUR **2.4** billion) frozen
 1.1% of proceeds of crime (EUR **1.2** billion) confiscated

The follow-the-money approach (1/2)



- **Preventing** illicit financial flows: detecting, tracing and preventing illicit financial flows through anti-money laundering and other regulations
- **Criminalising** illicit financial flows: investigating and prosecuting money laundering, terrorism financing, and even the possession of unexplained wealth
- **Depriving** illicit financial flows: freezing and confiscating the instrumentalities and proceeds of crime through the asset recovery strategy

The follow-the-money approach (2/2)



- **Birth:** ensuring that ‘**crime does not pay**’

As long as the property of organised crime remains, new leaders will step forward to take the place of those we jail (US Congress, 69’)

- **Momentums:**

- 1970-90s: ‘war on drugs’ and ‘war on organised crime’ – focus on money laundering (preventive and enforcement) & proceeds of crime
- 1990s: extension to all forms of acquisitive crime
- 2000s: ‘war on terror’ – focus on instrumentalities of crime
- 2000-10s financial crises: war on white-collar crime
- 2010-20s geopolitics: war on rogue governments



EU legal instruments

Chronological snapshot: early days



Laying the grounds

- Joint Action 98/699/JHA on money laundering, freezing & confiscation
 - Council Framework Decision 2001/500/JHA on money laundering, freezing & confiscation
 - Council Framework Decision 2003/577/JHA on execution of freezing property or evidence
 - Council Framework Decision 2005/212/JHA on confiscation of instrumentalities/proceeds of crime
 - Council Framework Decision 2006/783/JHA on mutual recognition of confiscation orders
 - Council Framework Decision 2007/845/JHA on cooperation between Asset Recovery Offices
-

Chronological snapshot: current framework



Reinforcing the legal framework

- **Directive 2014/42/EU** on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union
(replacing JA 98 and limited provisions of FDs 2001 and 2005)
 - + **Directive (EU) 2024/1260** *de lege ferenda*
- **Regulation (EU) 2018/1805** on the mutual recognition of freezing orders and confiscating orders
(replacing FDs 2003 and 2006 since 19/12/2020)

EU substantive law on freezing & confiscation (1/2)



Harmonisation of confiscation models

- *De lege lata*: **Directive 2014/42/EU + FDs 2001 & 2005**
 - Aim: improving domestic powers of freezing and confiscation
 - Means: requirement to adopt extended (freezing and) confiscation powers within the scope of criminal matters

EU substantive law on freezing & confiscation (2/2)



Harmonisation of confiscation models

- *De lege ferenda*: **Directive (EU) 2024/1260 on asset recovery and confiscation**
 - Aim: cover the whole asset recovery process by establishing minimum rules on the tracing and identification, freezing, confiscation and management of property within the framework of proceedings in criminal
 - Means: requirement to enable the swift tracing and identification of confiscable property, to set up at least one ARO and one AMO with relevant powers, and, among others and where possible, to allow the confiscation of unexplained wealth linked to criminal conduct
-

EU procedural law on freezing & confiscation



- **Mutual recognition of freezing and confiscation decisions**
- *Regulation (EU) 2018/1805 (replacing FDs 2003 & 2006)*
 - Aim: improving cross-border enforcement of freezing and confiscation orders
 - Means: requirement to recognize/execute orders provided there is a link with a criminal matter



Substantive rules for freezing and confiscation of criminal assets



De lege lata



Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

- The **main motive for cross-border organised crime** is **financial gain**: competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime (Rec. 1)
 - There is an **increasing need for effective international cooperation** on asset recovery and mutual legal assistance (Rec. 2)
 - Among the most effective means of combating organised crime is the freezing and confiscation of the instrumentalities and proceeds of crime (Rec. 3)
-

Directive 2014/42/UE per article



- **Standard conviction-based confiscation** (art. 4(1))
 - **(Non-)conviction-based confiscation** (art. 4(2))
 - **Extended confiscation** (art. 5)
 - **Third party confiscation** (art. 6)
 - **Freezing** (art. 7)
 - **Safeguards** (art. 8)
 - **Effective freezing/confiscation** (art. 9) (*post conviction investigation*)
 - **Management of assets** (art. 10)
 - **Statistics** (art. 11) / **Reporting** (art. 13)
-

Standard confiscation



- MS shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia

(Art. 4(1) of the Directive)

Confiscation without conviction



- Where confiscation [on the basis of a final conviction] is **not possible, at least** where such impossibility is the result of **illness or absconding** of the suspected or accused person, MS shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where **criminal proceedings have been initiated** [...] and [...] **could have led to a criminal conviction*** if the suspected or accused person had been able to stand trial

(Art. 4(2) of the Directive)

- In such cases of illness and absconding, the existence of proceedings ***in absentia*** in MS would be **sufficient** to comply with this obligation (Rec. 15)

- ***NOT** a true NCBC (false label)
-

Confiscation without conviction

Towards a true NCBC model?



Commission Staff Working Document: Analysis of non-conviction based confiscation measures in the European Union, 12.04.19
(SWD(2019) 1050 final)

- 2015 study concluded the assets of criminal groups are increasingly invested in other MS and criminals are reported to target those MS with weak asset recovery regimes
 - Given the openness of the EU's internal market, the exploitation of diverging confiscation regimes between MS has the potential to disrupt economic activity across the EU
 - MS' legal frameworks on non-conviction based confiscation have undergone considerable changes over the last years
-

Extended confiscation



- MS shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct

(Art. 5 of the Directive)

Extended confiscation



- There may be situations where it is appropriate that a criminal **conviction be followed by the confiscation** not only of property associated with a specific crime, but also **of** additional property which the court determines constitutes **the proceeds of other crimes** (Rec. 19)
 - This **does not mean that it must be established** that the property in question is derived from criminal conduct. MS may provide that it could, e.g., be sufficient for the court to consider on the **balance of probabilities**, or to **reasonably presume that it is substantially more probable**, that the property in question has been obtained from criminal conduct than from other activities (Rec. 21)
 - Applicable to Eurocrimes (specific, minimum rule) (Art. 5(2)-(3), Rec. 23)
-

Third Party Confiscation



- MS shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were **transferred** by a suspected or accused person to third parties, **or** which were **acquired** by third parties from a suspected or accused person, **at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation**, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value
- Shall not prejudice the rights of **bona fide** third parties

(Art. 6 of the Directive)



- MS shall take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation. Those measures, which shall be ordered by a competent authority, shall include **urgent** action to be taken when necessary in order to preserve property
- Property in the possession of a **third party**, as referred to under Art. 6, can be subject to freezing measures for the purposes of possible subsequent confiscation

(See Art. 7 of the Directive)

Implementation of the Directive... and beyond



Commission Staff Working Document: Analysis of non-conviction based confiscation measures in the European Union, 12.04.19

(SWD(2019) 1050 final)

- 25 MS (all except BG, IE, UK) primarily rely on NCBC within criminal proceedings
 - 26 (all except EL and IE) have extended confiscation regimes
 - 13 (EE, DE, EL, IT, LV, LT, LU, NL, PL, RO, SK, SL, ES) also have some form of true NCBC (in rem/unexplained wealth) regimes or have draft law envisaging them
 - 3 (BG, IE, UK) primarily rely on in rem/unexplained wealth proceedings
-

Implementation of the Directive... and beyond



Report from the Commission on asset recovery and confiscation: Ensuring that crime does not pay, 02.06.2020 (COM(2020) 217 final)

- 24/26 MS bound by the Directive adopted new legislation
 - Overall level of implementation of the Directive across the EU satisfactory
 - Overall results in terms of assets confiscated are not satisfactory and the confiscation rates in the EU remain very low
 - Numerous recommendations made in relation to:
 - the scope of criminal offences, management of frozen assets, disposal of assets, compensation of victims, capacity of AROs to trace and identify illicit proceeds...
 - NCBC (!): EC will further analyse to what extent models such as the Italian and German ones could serve as blueprints for a potential future EU NCBC regime
-



De lege ferenda

Directive (EU) 2024/1260



Directive (EU) 2024/1260 of 24 April 2024 on asset recovery and confiscation

- The new Directive covers the whole asset recovery process
 - It therefore replaces Joint Action 98/699/JHA, Framework Decisions 2001/500/JHA and 2005/212/JHA, Decision 2007/845/JHA *and* Directive 2014/42/EU
 - Member States must transpose the Directive by 23/11/2026
-



3 main objectives

- Enhance asset recovery rules
- Strengthen the legal framework on the management of property frozen and grant AROs additional powers
- Analyse the feasibility of introducing further common rules on the confiscation of property deriving from criminal activities, also in the absence of a conviction

Directive 2024/1260 per article



- Subject matter, scope and definitions (Art. 1-3)
 - **Asset tracing & identification (including recovery offices)** (Art. 4-10)
 - **Asset freezing & confiscation** (Art. 11-19) → *targetting unexplained wealth*
 - **Asset management (including offices)** (Art. 20-22)
 - Safeguards & legal remedies (Art. 23-24)
 - Asset Recovery Strategic Framework (Art. 25-28)
 - Cooperation between AROs & EU bodies, Agencies and third countries (Art. 29-31)
 - Final provisions (Art. 32-38)
-

Extended scope of offences covered



Directive 2014/42/EU

- Crimes listed in Article 83 TFEU (Eurocrimes)
- Other crimes harmonised at EU level

Directive 2024/1260

- Violation of EU restrictive measures
 - Crimes harmonised at EU level expressly listed (e.g., environmental crimes, migrant smuggling...)
 - Other crimes carried out within a criminal organisation (4 years threshold)
 - For tracing: crimes with a max. penalty of at least 1 year
-

Asset tracing, identification & recovery offices



- Mandatory asset-tracing (i.e. financial) investigations in high-revenue, and at least in organised crime cases (Art. 4)
 - Possibility to conduct asset tracing and identification investigations even after a final conviction (Art. 17)
 - Mandatory set-up and powers of AROs (Art. 5) responsible for:
 - Tracing and identifying property to be frozen or confiscated (Art. 5(2)), including by means of cooperation with other (MS') competent authorities
 - Urgent freezing powers in cross-border cases – max. 7 days (Art. 11(3))
 - Accessing relevant information (and databases) and exchanging information with other MS AROs (Art. 6-10)
-

Freezing and confiscation measures (1/5)



- Freezing (art. 11)
- Standard conviction-based confiscation (art. 12)
- Third party confiscation (art. 13)
- Extended confiscation (art. 14)
- (Non-)conviction-based confiscation (art. 15)
- Confiscation of unexplained wealth linked to criminal conduct (art. 16)

Freezing and confiscation measures (2/5)



- **Freezing:** idem Directive 2014/42, but possibility to take immediate (rather than urgent) action to enable to ensure a possible confiscation of the property
 - **Standard conviction-based confiscation:** idem Directive 2014/42, with increased focus on value-based confiscation
 - **Third party confiscation:** idem Directive 2014/42, with clarification that confiscation should be possible where the property was transferred to closely related parties while remaining under the effective control of the suspected or accused person
-

Freezing and confiscation measures (3/5)



- **Extended confiscation:** idem Directive 2014/42, but application to a wider list of crimes
- **(Non-)conviction-based confiscation:** idem Directive 2014/42, but application to a wider list of situations including death and expiration of statutory limitations

Freezing and confiscation measures (4/5)



- **Unexplained wealth confiscation (without conviction) – a new confiscation measure (!) (1/2)**
 - Member States shall take the necessary measures to enable, where, in accordance with national law, the confiscation measures of Articles 12 to 15 may not be applied, the confiscation of property identified in the context of an investigation in relation to a criminal offence, provided that a national court is satisfied that the identified property is derived from criminal conduct [as defined in this Directive and punishable by a maximum of at least 4 years of imprisonment] **committed within the framework of a criminal organisation** and that conduct is liable to give rise, directly or indirectly, to **substantial economic benefit** (without prejudicing the rights of bona fide third parties).
-

Freezing and confiscation measures (5/5)



- **Unexplained wealth confiscation (without conviction) – a new confiscation measure (!) (2/2)**
 - When determining whether the property [...] should be confiscated, account shall be taken of all the circumstances of the case, including the available evidence and specific facts, which may include that:
 - The value of the property is substantially disproportionate to the lawful income of the affected person
 - There is no plausible licit source of the property
 - The affected person is connected to people linked to a criminal organisation
-

Management of assets



- Asset management offices (Art. 22): mandatory set-up and powers
 - Asset management planning (Art. 20): either before or shortly after freezing
 - Interlocutory sales: selling property to preserve its value (Art. 21) – if goods are perishable, depreciating fast, or too difficult to manage
 - Tool for efficient asset management: providing swift access to information for AROs and AMOs
-



Procedural rules for mutual recognition of freezing and confiscation orders

Former legal framework for recognition/ execution of freezing/confiscation



- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders **freezing** property or evidence
&
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to **confiscation** orders
- **Yet...** lack of application of these instruments by MS

Insufficiencies of former legal framework



- As **crime is often transnational** in nature, **effective cross-border cooperation is essential** in order to seize and confiscate the proceeds and instrumentalities of crime (Rec. 4 of Regulation (EU) 2018/1805)
 - The EC's implementation reports on Framework Decisions 2003/577/JHA and 2006/783/JHA show that the **existing regime** for the mutual recognition of freezing and confiscation orders is **not fully effective**. The current instruments have **not been implemented and applied uniformly** in the MS, leading to **insufficient mutual recognition and sub-optimal cross-border cooperation** (Rec. 6)
 - The Union legal framework on mutual recognition of freezing and confiscation orders **has not kept up with** recent legislative developments at Union and national levels. In particular, Directive **2014/42/EU** sets out common minimum rules on freezing and confiscation of property (Rec. 7)
-

Examples of issues with former framework



Impact Assessment ([SWD\(2016\)468](#))

- While **France** is able to execute **Italian** NCBC orders under mutual legal assistance, **Spain** would systematically deny the execution of a civil NCBC order taken using in rem proceedings. For example, **Ireland** may issue a civil NCBC for criminal assets located in Spain when a criminal conviction is not possible. However, as Spain does not recognize such Irish order, the property order could not be confiscated and would remain at the offender's disposal
 - Another example is a case where both jurisdictions have NCBC, namely **Ireland** and the **United Kingdom**. In this case, a freezing order was obtained by Ireland. The target brought the assets across the border to Northern Ireland in an attempt to evade the order. The order could not be enforced in the United Kingdom as there exists no such mechanism even between NCBC jurisdictions
-

A procedural (R)evolution



Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders

- Simplifies *and* strengthens the applicable legal framework since **19/12/2020**
 - **One single legal instrument** for the recognition of **both** freezing and confiscation orders in other EU countries
 - Directly applicable in all MS (no transposition or delay):
 - Ensures uniformity in the application of the instrument and avoiding problems due to late or incorrect transposition by MS
 - **First EU Regulation in the field of mutual recognition in criminal matters** since the entry into force of the Lisbon Treaty (!)
-

Regulation (EU)2018/1805 a nutshell



- **Widened scope** of cross-border recognition (Rec. 14):
 - Applies to all orders issued "**within the framework of proceedings in criminal matters**" = covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, i.e.
 - Orders covered by Directive 2014/42/EU but also...
 - Other types of orders issued without a final conviction...
 - Excluding further to proceedings in administrative and civil matters (!)
 - ✓ Italian "*confisca di prevenzione*" / ~~UK/Irish "civil recovery"~~
 - Proceedings in criminal matters could also encompass criminal investigations by the police and other law enforcement authorities
 - **Rule:** while such orders might not exist in the legal system of a MS, the MS concerned should be able to recognise and execute such an order issued by another MS
-

Regulation (EU)2018/1805 a nutshell



- Increased **speed and efficiency** of freezing or confiscation orders:
 - standard document and obligation on the part of competent authorities to communicate with each other
 - clear deadlines, including shorter deadlines for freezing orders
- Ensured respect of **victims' rights** to compensation and restitution:
 - in case of cross-border execution of confiscation orders, the victim's right has priority over the executing and issuing MS' interest



- **Not** limited to Eurocrimes:
 - Regulation covering freezing orders and confiscation orders related to criminal offences covered by Directive 2014/42/EU, as well as such orders related to other criminal offences (Rec. 14)
 - **Systematic** recognition (art. 3(1)):
 - For a list of 32 offences
 - If punishable by a maximum of at least 3 years in the issuing MS
E.g. THB, terrorism, ML, corruption, but also rape, arson, racism, sabotage...
 - For other offences: recognition *may* be subject to the double criminality principle (art. 3(2))
-

Transmission of orders



- **Freezing** (art. 4 ff.): a freezing order shall be transmitted by means of a freezing certificate
 - Standard certificate form in Annex I
 - **Confiscation** (art. 14 ff.): a confiscation order shall be transmitted by means of a confiscation certificate
 - Standard certificate form in Annex II
 - The issuing authority shall provide the executing authority with a translation of the freezing/confiscation certificate in an official language of the executing MS or in any other language that the executing MS will accept (art. 6(2) and 17(2))
-

Clear deadlines for freezing/confiscation orders



– **Freezing** (art. 7-13):

- Decision on the recognition and execution of the freezing order to be taken **without delay** and with the same speed and priority as for a similar domestic case after receiving the freezing certificate
- If the issuing authority has legitimate grounds to believe that the assets in question will imminently be removed or destroyed: decision to be taken within **48 hours**
- Limited grounds for postponement, non-recognition and non-execution

– **Confiscation** (art. 18-22):

- Decision on the recognition and execution of the order to be taken no later than **45 days** after receiving the confiscation certificate
 - Limited grounds for postponement, non-recognition and non-execution
-

Questions ?



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How Asset Recovery and Confiscation Work in Practice

Freezing and Confiscation of Assets TRAINING FOR DEFENCE LAWYERS ERA

Rita Simões, 23 April 2025

How Asset Recovery and Confiscation Work in Practice

Overview

- Criminal finances today;
- Scope of application of regulation 2018/1805;
- Legal landscape in cross border asset recovery cases;
- Asset tracing, freezing and confiscation: a few practical challenges;
- Victims' rights;
- Affected persons and safeguards;
- Unexplained wealth confiscation;
- Asset management.

How Asset Recovery and Confiscation Work in Practice

Criminal Finances today

- Organized crime uses parallel financial systems to launder their proceeds: cash and cryptocurrencies;
- Obfuscation of illicit transactions;
- Organized crime increasingly successful at concealing proceeds;
- Low confiscation rate of approx. 2% of criminal assets.

(SOCTA 2025)

Challenges

- Multiple jurisdictions;
- Difficulty in identifying the masterminds;
- Large number of victims;
- Complexity of financial investigations and difficulties in asset recovery;
- Links to third countries;

How Asset Recovery and Confiscation Work in Practice

Asset Recovery in the EU

Harmonization: Directives 2014/42 and 2024/1260

- Value based confiscation;
- Conviction based confiscation;
- Non-conviction-based confiscation;
- Extended confiscation;
- Unexplained wealth confiscation (Directive 2024/1260);

Mutual Recognition: Regulation 2018/1805, FD 2003/577/JHA and FD 2006/ 783/JHA

- Regulation applies to proceedings in criminal matters;
- Proceedings in civil or administrative matters excluded from the scope of the Regulation;
- Applies to:
 - Confiscation powers included in the Directives;
 - Confiscation powers not included in the Directives;
 - Confiscation orders without a criminal conviction;
 - All crimes.

How Asset Recovery and Confiscation Work in Practice

Case Example

- ◆ An organized criminal group targeted high-value items — jewelry, art, and luxury cars — from homes in Spain.
- ◆ Stolen goods were trafficked to Germany and sold; proceeds were received in **cash and cryptocurrency**.
- ◆ **Cash flow:**
 - Smuggled to **Ireland**, deposited in mule bank accounts
 - Smuggled back to **Portugal**, where ringleaders were based
- ◆ Spanish authorities launched an investigation into **theft, organized crime, and money laundering**, involving Portugal, Germany and Ireland.
- ◆ A **Joint Action Day** was carried out with coordinated international efforts:
 - **Ireland:** Freeze bank accounts
 - **Germany:** Intercept and seize vehicle with stolen goods
 - **Portugal:** Search suspects' homes & devices to access and seize crypto wallets

How Asset Recovery and Confiscation Work in Practice

Asset recovery in cross border cases: the instruments

	Denmark & Ireland	Other EU countries
Asset tracing	MLA-2000 Convention	European Investigation Order
Asset freezing	FD 2003/577/JHA	Regulation 2018/1805
Asset confiscation	FD 2006/783/JHA	Regulation 2018/1805
Restitution	Art.8 2000 Convention	Regulation 2018/1805
Asset disposal	FD 2006/783/JHA	Regulation 2018/1805

Mutual Recognition

- Judicial decisions from one EU member state are automatically recognized & enforced in another;
- Based on mutual trust and respect for fundamental rights;
- Direct transmission between competent judicial authorities (with certificate);
- Limited grounds for refusal;
- Obligation to execute, unless grounds for refusal apply;
- Simplified & streamlined process;
- Time limits for recognition and execution.

How Asset Recovery and Confiscation Work in Practice

Asset Tracing

- **Exchange of information**

- Law enforcement;
- Asset Recovery Offices;
- Financial Intelligence Units;

- **Evidence**

- European Investigation Order;
- Article 9 (4) Directive 2024/1260

Information provided by an ARO in one Member State can be used as evidence in another Member State, unless otherwise indicated.

How Asset Recovery and Confiscation Work in Practice

Freezing: temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property.

- No harmonized definition of freezing: scope varies under national laws.
- Time limit: as long as necessary to preserve the property. Possible to limit the duration of the freezing, under art. 12 (2) Regulation 2018/1805.

“Immediate action”: ARO’s freezing powers-art.11 Directive 2024/1260

- Preserve property before a freezing order;
- AROs can act if there is risk of disappearance;
- Time limit: 7 working days.

How Asset Recovery and Confiscation Work in Practice

Restitution of frozen property to victims: art. 29 Regulation 2018/1805

- The issuing authority must **communicate any decision** to restitute frozen property to the victim via:
 - The **freezing certificate**, or
 - **Later notification** to the executing authority
- The executing authority must **return the property** to the victim **as soon as possible**, if:
 - Victim's title is **not contested**
 - Property is **not needed as evidence**
 - No prejudice to **third-party rights**
- The executing authority can return property **directly to the victim**, and must **inform the issuing authority**
- If the executing authority deems the conditions are not met:
 - Must **consult with issuing authority** promptly
 - If no agreement is reached, may **refuse restitution**

How Asset Recovery and Confiscation Work in Practice

Multijurisdictional money laundering/predicate offence investigation cases

- Linked investigations into money laundering and the predicate offence:
 - Possible conflicts of jurisdiction;
 - Conflicting investigative or freezing measures;
 - Domestic and international coordination;
- Restitution to victims
 - The frozen funds do not suffice to satisfy all the victims' claims for restitution;
 - Refusal to reconstitute fund to victims frozen in money laundering cases.

How Asset Recovery and Confiscation Work in Practice

Confiscation: restitution and compensation for victims: art. 30 Regulation 2018/1805

Issuing Authority includes information about restitution or compensation in confiscation certificate or later notify executing authority;

Executing Authority returns confiscated property to the victim as soon as possible or transfers compensation sum to victim, not exceeding the amount indicated in the certificate;

Challenge:

- National law may prevent the confiscation of property belonging to the victim.
- No confiscation order is issued but the victim's **compensation claim** is recognized by the court.
- Art. 18 (1), (4) and (5) Directive 2024/1260
- **Member States** must ensure that:
 - Victims' claims are considered during **asset-tracing, freezing, and confiscation** proceedings.
 - If a victim is entitled to the restitution of property subject to confiscation measures, **Member States** must ensure its return to the victim. Restitution must be carried out in accordance with the conditions outlined in **Article 15 of Directive 2012/29/EU**
- **Confiscation measures** should not undermine victims' **rights to compensation**.

How Asset Recovery and Confiscation Work in Practice

Safeguards in freezing and confiscation

- **Affected persons:** Regulation 2018/1805 and Directive 2024/1260:
 - Person targeted** by a freezing or confiscation order;
 - Owner** of property subject to such an order;
 - Third party** whose rights are directly prejudiced by the order;
 - Person whose property is subject to an interlocutory sale** (Directive 2024/1260).
- **Safeguards**
 - Right to be informed and to a fair trial;
 - Right to be informed of freezing and confiscation orders;
 - Right to challenge freezing and confiscation orders in court;
 - Rights of defence;
 - Right to have access to a lawyer;
 - Return of property;
 - Right to challenge interlocutory sales (Directive 2024/1260);
 - Rights of absconding persons (Directive 2024/1260);

How Asset Recovery and Confiscation Work in Practice

Upholding safeguards in cross border cases: Regulation 2018/1805

- Procedural rights Directives apply;
- EU Charter procedural rights applicable to criminal proceedings apply;

- **Affected persons can challenge:**
 - The substantive reasons for issuing the freezing or confiscation order **in the issuing State**;
 - The decision on the recognition and execution of freezing and confiscation orders **in the executing State**.

- **Challenges:**
 - Access to a lawyer in the issuing and executing States;
 - Lack of clarity as to where to present other claims.

How Asset Recovery and Confiscation Work in Practice

Unexplained wealth: confiscation of property linked to criminal organizations: art. 16 Directive 2024/1260

- Applicable if other confiscation measures (art. 12–15) are not possible;
- Applies to serious offences (min. 4 years imprisonment).
- Court must be satisfied property is criminal in origin and tied to organized crime if :
 - Disproportionate value vs. lawful income;
 - No plausible legal source’;
 - Links to criminal organization.

How Asset Recovery and Confiscation Work in Practice

Management of frozen/confiscated assets: Directive 2024/1260

- Focus on **efficiency, cost-effectiveness, and transparency**;
- Pre seizure planning and Asset Management Offices: the key to effectiveness;
- **Interlocutory Sales**
 - Sale of the asset before final confiscation if:
 - It is perishable or is quickly losing value;
 - Storage or maintenance costs are disproportionate to asset value;
 - Special expertise or conditions are required and not available;
- **Safeguards:**
 - Authorities must consider the interests of the affected person (e.g. if the item is easily replaceable);
 - Affected persons must be notified and given the possibility to be heard;
 - Affected persons should be allowed to request the sale of the property;
 - Affected persons can **challenge interlocutory sale orders** and request a **suspension** if there's risk of **irreparable harm**.
- Earnings from the sale must be secured until a final confiscation order is made.

How Asset Recovery and Confiscation Work in Practice

Management of frozen/confiscated assets in international cooperation cases

- Management is governed by the law of the Executing State- art. 28 Regulation 2018/1805;
- Interlocutory sales possible, under Directive 2014/42 (and 2024/1260);
- Executing State bears the costs of management, unless costs are exceptional;
 - What constitutes exceptional costs?
- Interlocutory sales:
 - Who decides: the issuing or the executing authority?
 - Is there the need for a request for an interlocutory sale?

Thank you



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ETHICS & COMPLIANCE

FREEZING AND CONFISCATION OF ASSETS

CRIMINAL DEFENCE CHALLENGES IN AN EVOLVING LEGAL FRAMEWORK

ERA

23 April 2025



**Co-funded by
the European Union**

On the menu



- EU case law on confiscation & human rights
- AML/CFT obligations as a criminal enforcement and confiscation tool

2 general trends in new confiscation models...



- Increased interest for ‘**non-conviction based**’ instruments:
 - Proceedings: criminal → civil/administrative
 - i.e. lower burden of proof
- Growing implementation of ‘**presumption-based**’ (‘extended’) instruments:
 - Burden of Proof: Jud. auth. → sharing/reversal on Def.
 - i.e. assets presumed to be of unlawful origin

... Leading to a decrease in scrutiny



- **Judicial**, conviction-based
- Judicial, conviction-based & **presumption**-based
- Judicial, **non-conviction** based
- Judicial, **non-conviction**-based & **presumption**-based
- **Non-judicial**... models!
- → Progressive **decline in defense protections**...
- ↓ – ... for the 'sake' of **efficiency**



CJEU

2020 judgment on NCBC



CJEU (3rd Ch), 19 March 2020, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo v BP and Others*, C-234/18

- First key judgment concerning the compatibility of NCBC powers (as implemented in Bulgaria) with the EU confiscation legal framework
- Prosecution for misappropriation around EUR 105 million + parallel civil proceedings for the confiscation of the unlawfully acquired property
- Challenge of the NCBC proceedings before domestic courts on the ground that such a power does not exist at EU level + violation of presumption of innocence and right to a fair trial

2020 judgment on NCBC



CJEU (3rd Ch), 19 March 2020

- CJEU Advocate General Sharpston:
 - EU law does not preclude bringing confiscation proceedings before a civil court where those proceedings are not relating to a criminal offence and their issue does not depend upon a criminal conviction
 - The presumption of innocence (Article 48(1) of the Charter) does not apply in this situation
- CJEU ruling:
 - Bulgarian NCBC powers go beyond the EU legal framework
 - EU law merely sets out common minimum rules for the confiscation of criminal property
 - EU law does not govern NCBC
- = **NO Application of Art. 48(1)**

2020 judgment on NCBC



- CJEU Advocate General Sharpston:
 - EU law does not preclude bringing confiscation proceedings before a civil court where those proceedings are not relating to a criminal offence and their issue does not depend upon a criminal conviction
 - The presumption of innocence (Article 48(1) of the Charter) does not apply in this situation
- CJEU ruling:
 - Bulgarian NCBC powers go beyond the EU legal framework
 - EU law merely sets out common minimum rules for the confiscation of criminal property
 - EU law does not govern NCBC
 - Conclusion: EU law *'Does not preclude national legislation which provides that a court may order the confiscation of illegally obtained assets following proceedings which are not subject either to a finding of a criminal offence or, a fortiori, the conviction of the persons accused of committing such an offence'*

2021 judgment on third-party confiscation



CJEU, 14 January 2021, Okrazhna prokuratura - Haskovo and Apelativna prokuratura – Plovdiv v OM, C-393/19

- **Ruling:** a national law permitting the **confiscation** of an **instrumentality** used to commit an aggravated smuggling offence, where it belongs to a **third party acting in good faith**, is **contrary to EU law**



ECtHR

On the ECtHR menu



- Confiscation in tension with the **presumption of innocence**
- Confiscation in tension with the **right to a fair trial**
- Confiscation in tension with the **right to property**



Confiscation in tension with... ... the presumption of innocence

Presumption of innocence



Art. 6(2) ECHR: *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*

To be examined under two aspects (*Gogitidze and Others v. Georgia* (2015)):

- **Narrow:** pending trial
 - **Extensive:** after criminal proceedings have ended without conviction
- Challenges raised in relation to conviction-based confiscation (**CBC**), i.e. extended confiscation, and non-conviction-based confiscation (**NCBC**), i.e. both civil confiscation & UWOs

Presumption of innocence



When is art. 6(2) triggered?

When confiscation amounts to the determination of a criminal charge

How to assess?

The “Engel Test” (*Engel and Others v. the Netherlands* (1976))

- Domestic classification of the measure
- Nature of the offence
- Degree of severity of the penalty

Presumption of innocence



CBC: Extended confiscation

▪ When confiscation targets proceeds of similar/other offences

(Phillips v. the United Kingdom (2001) & Van Offeren v. the Netherlands (2005))

Engel Test:

- 1st criterion: *“it is clear that such an application does not involve any new charge or offence in terms of the criminal law”*
- 2nd & 3rd: *“the purpose of this procedure was not the conviction or acquittal of the applicant”; “it cannot be said that the applicant was “charged with a criminal offence”*
→ *“the confiscation order procedure must therefore be regarded as analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on” a properly convicted offender and “did not involve the bringing of any new “charge” within the meaning of Article 6 § 2 of the Convention”*

= **No** application of Art. 6(2)

Presumption of innocence



CBC: Extended confiscation

- **When confiscation targets proceeds of a crime for which the person was acquitted**

(Geering v. the Netherlands (2007))

- the applicant “*was never shown to be in possession of any assets for whose provenance he could not give an adequate explanation*”
- “*unlike in the Phillips and Van Offeren cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted*”
- this goes further than the voicing of suspicions: “*It amounts to a determination of the applicant's guilt without the applicant having been “found guilty according to law”*”

= Application & violation of Art. 6(2)

Presumption of innocence



NCBC: Standard civil confiscation

(Butler (2002) & Walsh (2006) v. the United Kingdom)

- Engel Test
 - Proceedings regarded as civil in nature (not criminal)
 - Did not aim at convicting/acquitting the applicant (criminal charges never brought / Court never took into account any conduct in respect of which the applicant had been acquitted)
 - Severity is not itself determinative of the criminal nature (not punitive in nature in spite of hefty sum)
- Does **not** involve the determination of a criminal charge (but is preventive in nature; purpose is to take out illicit money from the legal economy)
- = **No** application of Art. 6(2)

Presumption of innocence



NCBC of unexplained wealth: Italian preventive confiscation

(M (1991), Teresi (1992), Raimondo (1994), Autorino (1998), Prisco (1999), Arcuri (2001), Riela and Others (2001) & Bocellari and Rizza (2007)... v. Italy)

- Engel Test (*M v Italy* (1991))
 - Preventive and not criminal in nature
 - Autonomous proceedings that do not involve the finding of guilt of the subject, conditional upon prior declaration of dangerousness, based on sufficient circumstantial evidence
 - Severity is not so great as to warrant its classification as a criminal penalty
- Does **not** entail a criminal charge, involve a finding of guilt or constitute a penalty (purpose is to prevent the commission of offences (*M* (1991) & *Raimondo* (1994)))
- = **No** application of Art. 6(2)

Presumption of innocence



NCBC of unexplained wealth: Georgian UWOs

(Gogitidze and Others (2015) & Devadze and Others v. Georgia (2016))

– Did not even conduct an Engel Test (!):

“the Court reiterates, in the light of its well-established case-law, that the forfeiture of property ordered as a result of civil proceedings in rem, without involving determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature and thus cannot give rise to the application of [Article 6 § 2]”

= **No** application of Art. 6(2)

N.B.: *Gogitidze* (unanimous judgment) = new leading case-law for NCBC?

Presumption of innocence



Takeout:

- **CBC (extended)** does **not** trigger Art. 6(2) since it does not amount to a criminal charge but rather constitutes part of the sentencing process...
 - **except** when the scope of confiscated property includes assets linked to a crime for which defendant was actually acquitted
 - **NCBC** (be it **standard** or of **unexplained wealth**) does **not** trigger Art. 6(2) and the presumption of innocence since it does not amount to a criminal charge but rather has a preventive or remedial purpose
- = Very limited applicability of Art. 6(2)



Confiscation in tension with... ... the right to fair trial

Right to a fair trial



Art. 6(1) ECHR: *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

- Challenges raised in relation to **CBC** (extended confiscation) and **NCBC** (civil confiscation, UWOs)
- **CBC: Extended** (*Phillips* (2001); *Grayson and Barnham* (2008); *Minhas* (2009));
- **NCBC: Standard** (*Webb* (2004)); **UWOs** (*Gogitidze* (2015))

Right to a fair trial



Takeout: unfairness of... burden of proof

- Confiscation should be ordered as a result of fair and non-arbitrary proceedings overall.
- This includes ensuring procedural fairness through affording the confiscation subject: effective access to courts, re-hearing, adversarial proceedings, equality of arms, fair administration of evidence, representation by a counsel of their choice, and a sufficiently reasoned judgment on all points at issue
- The way the domestic courts apply statutory presumptions (if any) *and* the possibility for the confiscation subject to rebut such presumptions also bear importance:
 - The ECtHR is not opposed to the use of presumptions that are confined within reasonable limits
 - It is not inherently unfair or arbitrary to apply evidentiary standards such as the balance of probabilities (the civil standard of proof) or even lower (such as substantiated suspicions) in confiscation proceedings, including when they lead to a shifting or even to a true reversal of the burden of proof onto the confiscation subject

Right to a fair trial



Unreasonableness of... length of proceedings

Takeout: to be assessed taking a comprehensive view of the proceedings, including the total length of confiscation proceedings, the complexity of the case and the many stages of proceedings, the conduct of the confiscation subject and of the domestic authorities
(**NCBC:** *Raimondo* (1994); *Ruga* (1995) & *Autorino* (1998) *v. Italy* = **no** violation)

Necessity of... Right to public hearing (!)

Takeout: confiscation subjects should at least have the opportunity to ask for a public hearing to challenge confiscation
(**NCBC:** *Bocellari and Rizza* (2007); *Bongiorno and Others* (2010) & *Pozzi* (2011) *v. Italy* = **violation**)



Confiscation in tension with... ... the right to property

Right to property



Art. P1-1: (1) *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
(2) *The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

3 Rules : (*Sporrong / Lonnroth v Sweden* (1982))

- General principle: **Peaceful enjoyment** of property
- **Deprivation** exception: States are entitled to deprive property subject to certain conditions
- **Control of the use** exception: States are entitled to control the use of property in accordance with the general interest

→ Challenges raised in relation to **CBC** (extended confiscation) and **NCBC** (civil confiscation, UWOs)

Right to property



When is art. P1-1 and the right to property triggered?

When there is an **interference**: deprivation/control of the use of property rule

How to assess the existence of a violation?

(summarized in *Gogitidze* (2015))

P1-1 'Fair-Balance' Test:

- **Lawfulness** of the interference
- **Legitimacy** of the aim pursued
- **Proportionality** of the interference
 - Whether the procedure for confiscation was arbitrary
 - Whether the domestic courts acted without arbitrariness

Right to property



P1-1 'Fair-Balance' Test:

- **Lawfulness**

- I.e. legal certainty: accessibility, foreseeability, precision

- **Legitimacy**

- I.e. in the public or general interest: wide margin of appreciation of States

- **Proportionality (!)***

- I.e. **fair balance v. arbitrariness**: whether the interference was proportionate and whether the applicant did not have to bear an excessive individual burden

Right to property



*The proportionality criterion

- “*Reasonable relationship of proportionality between the means employed and the aim sought to be realised*” (Phillips (2001))
- The proportionality of the interference is based on...
 - The particular circumstances of the case (‘deprivation’ v. ‘control of the use’ of property)
 - The conduct of the confiscation subject
 - The conduct of the domestic authorities
 - Whether the applicant was afforded a **reasonable opportunity** to put its case before relevant authorities (!)**

Right to property



****Reasonable opportunity to put its case before relevant authorities: relevant factors**

- Those factors applicable within the scope of Article 6(1)
- Effective access to a court
- Adversarial proceedings
- Rebuttable presumptions of fact or of law and burden of proof
- Mandatory or discretionary character of confiscation
- Right to rehearing

Right to property



****Reasonable opportunity to put its case before relevant authorities**

- Very much akin to the right to a fair trial (link with art. 6(1))
 - “*Flagrant denial of justice*” would indeed constitute violation of P1-1 (*Insanov v. Azerbaijan* (2013))
 - Absence of judicial review should lead to violation of P1-1 (*Microintelect Ood v. Bulgaria* (2014))
 - P1-1 may also be violated when the scope of judicial review is too narrow (*Paulet v. the United Kingdom* (2014))
 - Presumptions of fact and law call for effective review, opportunity to rebut, adversarial proceedings (*M* (1991); *Butler* (2002)...)
 - ...

Right to property



****Reasonable opportunity to put its case before relevant authorities**

- E.g. **CBC (Extended)** – *Butler (2002)* :
 - *Defendant*: able to dispute the reliability of the evidence at oral hearing; not faced with irrebutable presumptions of fact or law; open to the applicant to adduce documentary or oral evidence; right to a re-hearing...
 - *Court*: power subject to judicial supervision; not unfettered discretion to confiscate; relied on forensic and circumstantial evidence; weighed the evidence and assessed it carefully; refrained from automatic reliance on presumptions...

- E.g. **NCBC (UWOs)** – *Gogitidze (2015)*:
 - *Defendant*: duly summoned; opportunity to adduce written submissions in reply; took part in an oral hearing; could have designated lawyers to represent him; benefitted from adversarial proceedings; interference corresponds to severity of infringement...



Violation of P1-1: confiscation is **disproportionate** when there is a **lack** of sufficient **safeguards** to achieve the fair balance requirement

Todorov and Others v. Bulgaria (2021)

- The broad scope of confiscation of the applicable law in these cases is likely to tip the balance in favor of the State
- This imbalance must be counterbalanced by, in particular, the obligation to demonstrate certain links with actual criminality in the provenance of the assets to be confiscated
- It is for the domestic courts to determine whether such compensation has taken place
- However, the ECtHR acquires jurisdiction when it is demonstrated that the courts' reasoning was arbitrary or manifestly unreasonable



Todorov and Others v. Bulgaria (2021)

- The ECtHR found that the confiscation of the property was disproportionate, resulting in a violation of the Convention, due to the lack of sufficient safeguards to achieve the fair balance required to guarantee the applicants' right to property. The Court noted, in particular:
 - The failure to examine the link between the property and the alleged criminal activity
 - The determination by the domestic courts of the adequacy of the confiscated property and the difference between the applicants' expenses and income

Right to property



Takeout:

- Type of **interference** bears limited weight on the analysis
- **Lawfulness** is quite foreseeable yet has led to findings of violations in practice
- **Legitimacy** is only subject to a very marginal control by the ECtHR
- **Proportionality** (fair balance) is the intrinsic part of the analysis

Few decisions have concluded to a violation of P1-1

→ Must be a blatant violation (?)

See concur./dis. opinion of J. Pinto de Albuquerque in *Varvara v. Italy* (2013)



AML/CFT compliance & confiscation

The follow-the-money approach



- **Preventing** illicit financial flows: detecting, tracing and preventing illicit financial flows through anti-money laundering and other regulations
- **Criminalising** illicit financial flows: investigating and prosecuting money laundering, terrorism financing, and even the possession of unexplained wealth
- **Depriving** illicit financial flows: freezing and confiscating the instrumentalities and proceeds of crime through the asset recovery strategy

The 3 stages of money laundering

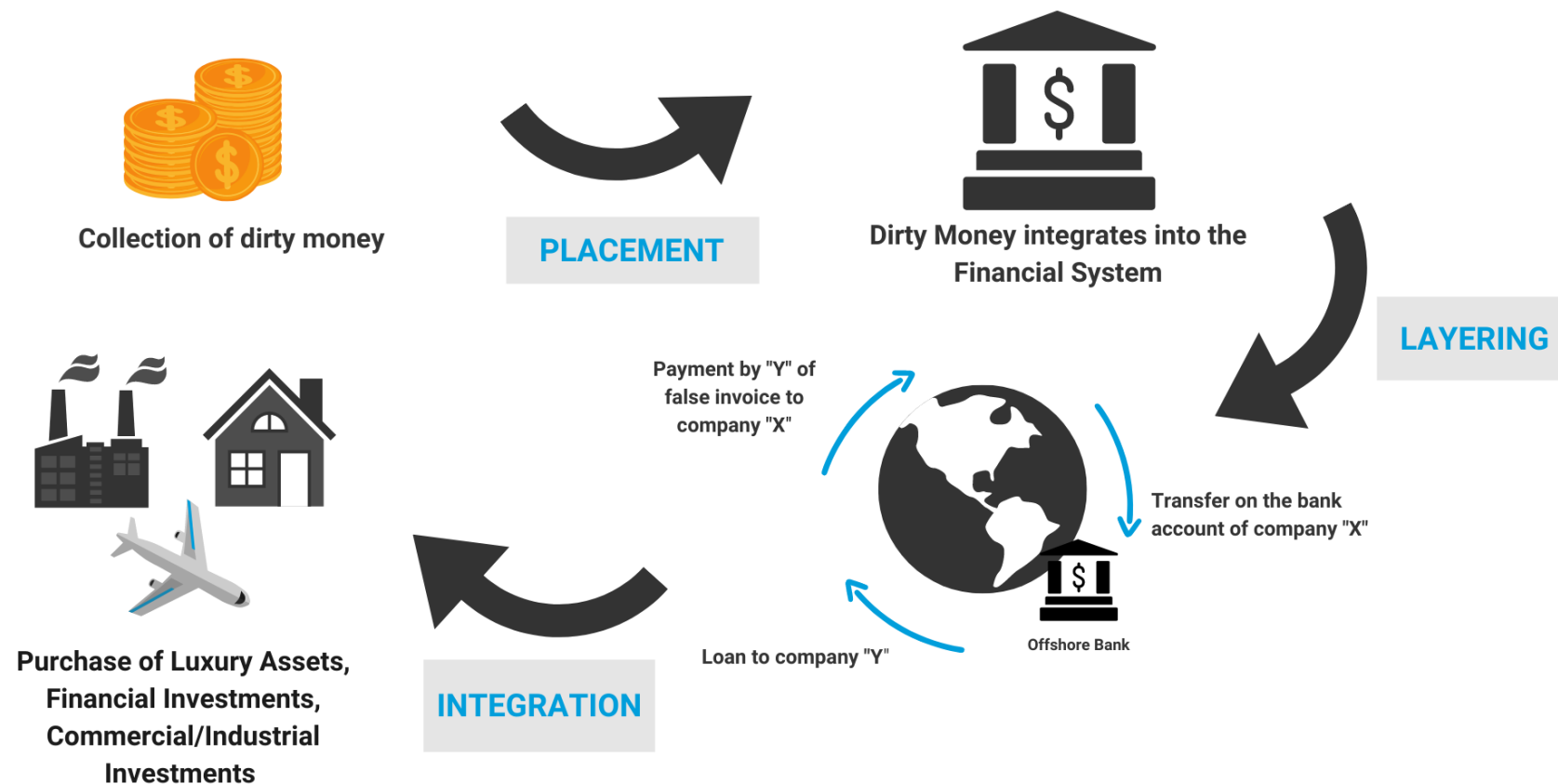


- **Placement:** the criminals inject the "dirty" money into the legitimate financial system
 - **Layering:** the criminals carry out multiple operations to break the link between the money and its illicit source
 - **Integration:** the money is returned to the criminals from what seem to be legitimate sources
-

Money laundering in the books...

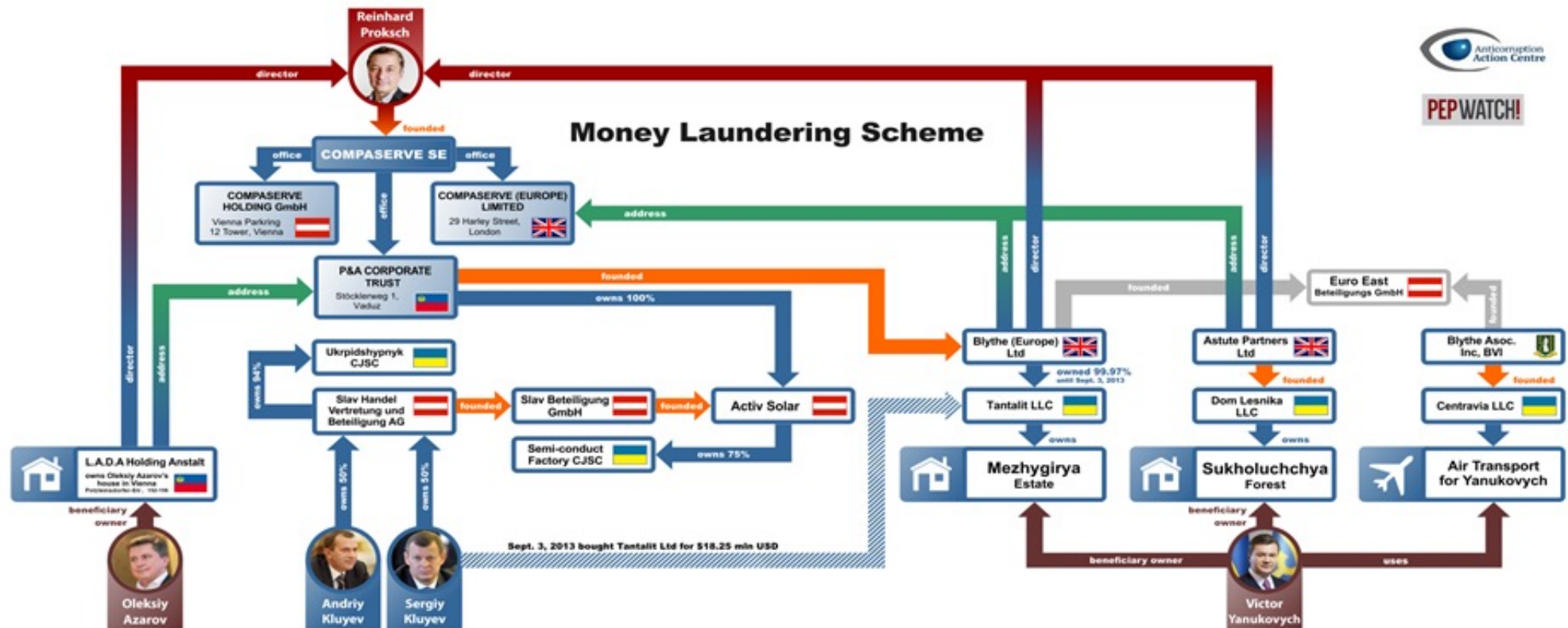


Money Laundering Cycle



Source: <https://www.unodc.org/unodc/en/money-laundering/overview.html>

...Money laundering in action



Source: <https://antac.org.ua/en/news/statky-zlochynnoji-vlady-viktor-yanukovych/>

The dual approach to fighting ML



Preventive (regulatory) : responsibility of private operators (obliged entities)

Positive obligations

Violation by negligence

= administrative sanctions (by supervisory authority)

+

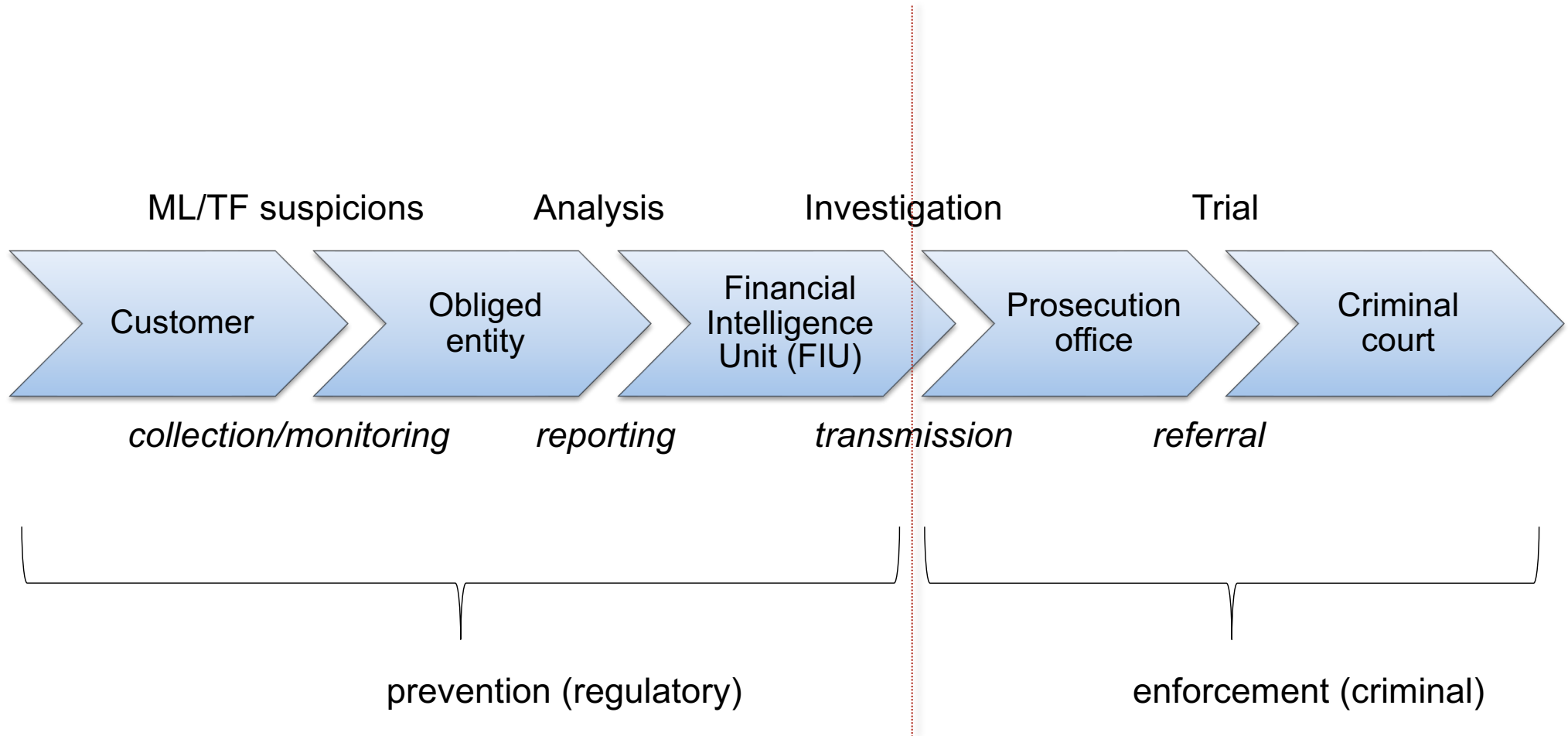
Enforcement (criminal) : responsibility of enforcement authorities

Negative obligation

Intentional violation

= criminal sanctions (by criminal authorities)

The dual approach to fighting ML



Personal scope: obliged entities



- **Obligated entities:** designated operators of the private sector legally required to comply with AML/CFT obligations and prevent, detect and report ML/TF suspicions
- List of obliged entities (see [Art. 2\(1\) 4AMLD](#)):
 - Financial institutions and professions
 - Designated non-financial businesses & professions (**DNFBPs**)
 - Including lawyers

Obligations under the EU AML framework



Obligated entities must comply with several core requirements:

- **Overall risk assessment**
 - **Internal organisation**
 - **Individual risk assessment + customer due diligence**
 - **ML/TF suspicions reporting to Financial Intelligence Unit**
 - **Record keeping**
- ... Using a full **risk-based approach**
-

Customer due diligence (CDD)



- **Know your customer (KYC):**

- Identifying customer & verifying their identity
- Obtaining information on purpose and nature of relationship/transaction
- Conducting ongoing monitoring of risk profile of customer

- **Know your transaction (KYT):**

- Ongoing monitoring of customer transactions and activities

... Every step of ongoing CDD process (KYC & KYT) being based on RBA



- **Who** must be *identified*?
 - The customer, including its agents and beneficial owners

 - **What** must be identified?
 - More or less information, depending on the level of risk identified

 - **What** must be *verified*?
 - More or less documents or data, depending on the level of risk identified

 - **When** must it be identified and verified?
 - Prior to entering the business relationship or the transaction (save for exceptions)
-

CDD – KYC

Beneficial owners



- **Beneficial owner** = ultimate beneficial owner (**UBO**)
= any natural person who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted
- Applies to corporate entities, trusts, foundations, and similar legal arrangements (**Reporting Entities**)
- Reporting Entities must report their UBOs to their designated national central register (the so-called **UBO Register**)

(See [Rec. 12-17 and Art. 3\(6\) 4AMLD](#))

CDD – KYC

Risk level



RBA (ORA + **IRA**) determines customer AML/CFT risk profile level of due diligence to apply:

- **Medium risk**: standard due diligence ([Art. 10-14 4AMLD](#))
 - **Low risk**: simplified due diligence *may* apply (**SDD**) ([Art. 15-17 4AMLD](#))
 - **High risk**: enhanced due diligence *must* apply (**EDD**) ([Art. 18-24 4AMLD](#))
-

CDD – KYC

Objective higher risk factors



- **Politically Exposed Person (PEP):**

- A natural person who is or who has been entrusted with prominent public functions
- PEP family members and close associates are assimilated

(See Rec. 33 and Art. 33(9) 4AMLD)

- **High-Risk Third Country (HRTC):**

- Non-EU country identified as having AML/CFT strategic deficiencies by an EC Delegated Regulation

(See Rec. 28-29 and Art. 9 and 18 4AMLD)

- N.B.: FATF also establishes its own list of high risk and other monitored jurisdictions)



- Higher risk transactions:
 - Complex
 - Unusually large
 - Conducted in an unusual pattern
 - Without an apparent economic or lawful purpose
- (See [Art. 18\(2\) 4AMLD](#))

→ Increase of degree and nature of monitoring of the relationship to determine whether these transactions/activities are suspicious from an ML/TF perspective

Reporting of suspicions to the FIU

- **Financial Intelligence Unit (FIU)**: central national AML/CFT authority responsible for receiving and analysing suspicions reports.
- FIU communicates reports to prosecution office if ML/TF suspicions are confirmed
- FIU = intermediary between obliged entities & criminal authorities for law enforcement purposes

N.B.: suspicions reports are seldom referred to as suspicious transaction reports (**STRs**) or suspicious activity reports (**SARs**)

(See [Rec. 37 ff. and Art. 32-38 of 4AMLD](#))



Obligated entities & confiscation

Ordering confiscation against obliged entities



A client deposits funds in a bank that were not subjected to tax declaration

- Client: tax fraud + money laundering
- Financial institution, management, compliance officer, and staff: tax fraud; money laundering of tax fraud (excluding exemptions)
- Possibility of double confiscation:
 - Tax fraud on the part of the client
 - Money laundering on the part of the financial institution

Ordering confiscation against obliged entities



What is the confiscable property?

- EUR 1,000,000 not subject to tax = EUR 1,000,000 confiscation?
- Principle: limited to the tax actually evaded
- E.g. EUR 1,000,000 of income evading 30% tax: EUR 300,000 confiscable
- In practice: 300K (against client for tax fraud) + 300K (against bank) for ML
- Confiscable amount for tax evasion and money laundering depends on the type of capital invested and income received

Questions ?



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EXCELLENCE IN
EUROPEAN LAW¹



Webinar on Freezing and Confiscation of Assets

Training for Defence Lawyers

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Background Documentation

Table of Contents with Hyperlinks



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The table of contents below is hyperlinked, with each entry taking you to the respective document on the web.

A) EU Institutional Framework

A1) Main Treaties and Conventions

A1.1	Consolidated version of the Treaty on the functioning of the European Union, art. 82-86 (OJ C 326/47; 26.10.2012)
A1.2	Consolidated Version of the Treaty on the European Union, art. 9-20 (OJ C326/13; 26.10.2012)
A1.3	Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)

A1.4	Charter of fundamental rights of the European Union (OJ. C 364/1; 18.12.2000)
A1.5	European Convention for the Protection of Human Rights and Fundamental Freedoms and additional protocols (ETS No. 005; 3.5.1953)

B) EU Asset Recovery and Confiscation Legislation of Relevance to Lawyers

B.1	Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation
B.2	Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders
B.3	Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union
B.4	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters
B.5	Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime
B.6	Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
B.7	Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property
B.8	Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
A.9	2001/500/JHA: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime
B.10	Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union - Council Declaration on Article 10(9) - Declaration by the United Kingdom on Article 20, 12 July 2000

B.11	Joint action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (98/699/JHA)
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C) European Commission Documents of Relevance to Lawyers

C.1	<u>Report from the Commission to the European Parliament and the Council: Asset Recovery and Confiscation: Ensuring that crime does not pay, Brussels, 2 June 2020, COM(2020) 217 final</u>
C.2	<u>Commission Staff Working Document: Analysis of non-conviction based confiscation measures in the European Union, Brussels, 12 April 2019, SWD(2019) 1050 final</u>
C.3	<u>Commission Staff Working Document – Impact Assessment Accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, Brussels, 21.12.2016, SWD(2016) 468 final</u>

D) Selection of Relevant Court of Justice of the European Union (CJEU) Case Law

D.1	Judgment of the Court (First Chamber) of 14 January 2021, Okrazhna prokuratura - Haskovo and Apelativna prokuratura – Plovdiv v OM, Case C-393/19
D.2	Judgment of the Court (Third Chamber) of 19 March 2020, Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo v BP and Others, Case C-234/18

E) Selection of Relevant European Court of Human Rights (ECtHR) Case Law

E.1	Devadze v. Georgia, 11 October 2016
E.2	Case of Gogitidze and Others v. Georgia, Fourth Section, 12.08.2015
E.3	Case of Geering v. The Netherlands, Third Section, 1 March 2007

E.4	Walsh v. The United Kingdom, Fourth Section, 21 November 2006
E.5	Van Offeren v. The Netherlands, Third Section, 5 July 2005
E.6	Case of Butler v. The United Kingdom, Third Section, 27 June 2002
E.7	Case of Phillips v. The United Kingdom, Fourth Section, 5 July 2001
E.8	Case of Raimondo v. Italy, 22 February 1994
E.9	Case of M v. Italy, 15 April 1991
E.10	Case of Engel and Others v. The Netherlands, Court (Plenary), 23 November 1976

F) Useful Websites

F.1	European Judicial Network (EJN)
F.2	Court of Justice of the European Union <ul style="list-style-type: none"> • Case-law
F.3	European Court of Human Rights <ul style="list-style-type: none"> • Judgments and decisions
F.4	EUR-Lex

Factsheet on Freezing and Confiscation of Assets

Introduction

The freezing and confiscation of property prevents criminals benefiting from illegally acquired assets. These measures are essential tools in combatting (organised) crime, disrupting criminal networks and ensuring that illicit profits do not re-enter the economy.

- Freezing assets refers to the temporary retention of property, restricting access until a final legal decision is made. Confiscation is a permanent measure that removes property from offenders, preventing them from profiting from crime. A well-functioning asset recovery system is crucial to protecting European citizens and reinforcing the EU's commitment to justice and security
- Freezing assets refers to the temporary retention of property until a final decision is made in the case, meaning the owner cannot access their assets before the case is concluded.
- Confiscation, on the other hand, is a permanent measure that prevents criminals from benefitting from property acquired through illegal activities. The property is permanently taken away from the offender or their accomplices.

A well-functioning system for seizing and confiscating criminal assets plays a crucial role in combatting crime while protecting the interests of European citizens.

What is the current legal framework on asset recovery?

The current asset recovery and confiscation legal framework is composed of mainly three legal instruments each covering part of the asset recovery and confiscation process:

- The 2014 [Confiscation Directive 2014/42/EU](#), which establishes minimum rules on freezing, confiscation and management of criminal property
- The 2007 [Asset Recovery Offices Council Decision](#), which facilitates information exchange and cooperation in tracing property among asset recovery offices

- The 2005 [Framework Decision on Confiscation 2005/212/JHA](#), which has for the most part been replaced by the Confiscation Directive but remains in place for so-called confiscation measures
- These instruments are complemented by [Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders](#).

An [evaluation of the 2007 Asset Recovery Offices Council Decision](#) found it had limited success. Financial investigations were not systematically conducted and asset recovery offices (AROs) lacked the necessary powers, resources and cross-border access to effectively trace assets. Poor asset management caused frozen properties to lose value and existing confiscation mechanisms failed to cover all relevant crimes – allowing criminals to retain 99% of their illicit gains.

New 2024 Directive on Asset Recovery and Confiscation

The new Directive establishes EU-wide minimum rules to enhance the tracing, identification, freezing, confiscation and management of criminal assets. This directive strengthens the EU's legal framework and facilitates the recovery of illicit funds across Member States.

Key features of the Directive:

- Covers a broad spectrum of crimes such as organised crime, terrorism, human trafficking, drug trafficking, corruption, and money laundering.
- Expands asset confiscation to sanction evasion, targeting those who evade EU sanctions, including those imposed in response to Russia's aggression against Ukraine.
- Strengthens cross-border cooperation, making it easier for Member States to trace and seize illicit assets.

Mandatory measures for Member States:

- Swift asset tracing & identification: Authorities must quickly locate and assess assets linked to criminal activities.
- Immediate asset-tracing investigations: Required when crimes generate significant economic benefits.
- Freezing & confiscation rules: Allows freezing assets before trial and confiscation them after conviction.
- Value-based confiscation: Enables authorities to confiscate assets of equivalent value when direct proceeds are unavailable.
- Third-party confiscation: Assets transferred to accomplices can be seized if the recipient knew or should have known the intent to evade confiscation.

- Confiscation without criminal conviction: Assets can still be confiscated in cases where prosecution is impossible, e.g. due to death, illness, or absconding.
- Unexplained wealth confiscation: Property linked to criminal organisations generating significant illicit profits can be seized.
- Victim compensation: Ensures that victims claims are considered in asset recovery procedures.

How can judges confiscate criminal property?

- Under the old rules:
 - Standard confiscation: Seizing assets directly stemming from a crime.
 - Value confiscation: Confiscating assets transferred to relatives or associates.
 - Extended confiscation: Seizing assets gained from previous criminal activities.
 - Non-conviction-based confiscation: Possible when prosecution is impossible.
- Expanded confiscation circumstances under the new rules:
 - Includes cases where the accused has died, benefits from immunity or amnesty or when prosecution time limits have expired.
 - Particularly important for corruption cases and criminals who delay judicial proceedings.
- Addressing organised crime's opaque nature:
 - Criminals hide assets and disguise illicit origins to avoid confiscation. The new rules allow confiscation of unexplained wealth linked to criminal activity, even if it cannot be tied to a specific crime. They are applied when assets do not match the official income, with strict safeguards ensuring due process.
- Impact of new rules: Provide judicial authorities with a comprehensive set of confiscation tools.
 - Strengthens efforts to seize illicit assets from organised crime.
 - Ensures recovered assets benefit society, victims and affected communities.

Key EU institutions involved in asset recovery and confiscation

Several EU institutions play a crucial role in enforcing asset recovery and confiscation measures:

- [European Public Prosecutor's Office \(EPPO\)](#): Investigates and prosecutes financial crimes affecting the EU budget, such as fraud, corruption and money laundering.
- [Europol's European Financial and Economic Crime Centre \(EFECC\)](#): Supports national law enforcement agencies by providing intelligence, operational support and expertise in financial crime investigations.
- [Eurojust](#): Facilitates judicial cooperation between Member States to ensure effective cross-border investigations and prosecutions related to asset recovery.
- Asset Recovery Offices (AROs): National offices designated by each EU Member State to cooperate in tracing and identifying criminal assets across borders.
- The [European Anti-Fraud Office \(OLAF\)](#): Conducts administrative investigations into fraud, corruption and misuse of EU funds, complementing national and EPPO criminal investigations.
- Financial Intelligence Units (FIUs): National authorities responsible for collecting and analysing financial information related to money laundering and financial crimes, which cooperate at EU-level.

Legal Vocabulary: Freezing and Confiscation of Assets

affected person	The natural or legal person against whom a freezing order or confiscation order is issued or the natural or legal person that owns the property that is covered by that order, as well as any third parties whose rights in relation to that property are directly prejudiced by that order under the law of the executing state.
beneficial owner	Any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted.
business relationship	A business, professional or commercial relationship which is connected with the professional activities of an obliged entity and which is expected, at the time when the contact is established, to have an element of duration.
confiscation	A penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences.
confiscation order	A final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person.
criminal organisation	A structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.
executive authority	An authority that is competent to recognise a freezing order or confiscation order and to ensure its execution in accordance with EU law and the

	procedures applicable under national law for the freezing and confiscation of property, where such procedures require that is competent to request such registration and authorisation.
executing state	A Member State in which a freezing order is transmitted for the purpose of recognition and execution.
freezing	The temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property.
freezing order	A decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof.
gambling service	A service which involves wagering a stake with monetary value in games of chance, including those with an element of skill such as lotteries, casino games, poker games and betting transactions that are provided at a physical location, or by any means at a distance, by electronic means or any other technology for facilitating communication, and at the individual request of a recipient of services.
instrumentalities	Any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.
issuing authority	<p>1) In respect of a freezing order:</p> <p>a.) A judge, court, or public prosecutor competent in the case concerned, or</p> <p>b.) Another competent authority which is designated to as such as by the issuing state and which is competent in criminal matters to order the freezing of property or to execute a freezing order in accordance with national law. In addition, before it is transmitted to the executing authority, the freezing order shall be validated</p>

	<p>by a judge, court or public prosecutor in the issuing state after examining its conformity with the conditions for issuing such an order under this Regulation. Where the order has been validated by a judge, court or public prosecutor, that other competent authority may also be regarded as an issuing authority for the purposes of transmitting the order</p> <p>2) In respect of a confiscation order, an authority which is designated as such by the issuing state and which is competent in criminal matters to execute a confiscation order issued by a court in accordance with national law.</p>
issuing state	A Member State in which freezing order or confiscation order is issued.
legal aid	Funding by a Member State for the assistance of a lawyer, enabling the exercise of the right of access to a lawyer.
legal person	Any entity having such status under the applicable national law, except for states or other public bodies in the exercise of State authority in the final deprivation of property.
proceeds	Any economic advantage from criminal offences. It may consist of any form of property as defined in the following indent.
property	Property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.
self-regulatory body	A body that represents members of a profession and has a role in regulating them, in performing certain supervisory or monitoring type functions and in ensuring the enforcement of the rules relating to them.
senior management	An officer or employee with sufficient knowledge of the institution's money

	laundering and terrorist financing risk exposure and sufficient seniority to take decisions affecting its risk exposure, and need not, in all cases, be a member of the board of directors.
shell bank	A credit institution or financial institution, or an institution that carries out activities equivalent to those carried out by credit institutions and financial institutions, incorporated in a jurisdiction in which it has no physical presence, involving meaningful mind and management, and which is unaffiliated with a regulated financial group.
structured association	An association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.
tracing and identification	Any investigation by competent authorities to determine instrumentalities, proceeds or property that might be derived from criminal activities.
victim	A natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.